

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JO-DEL, INC.

and

TRI-STATE BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO

Cases 9-CA-34160
9-CA-34227-3
9-CA-34266
9-CA-34323-2
9-CA-34425
9-CA-34452

Engrid E. Vaughn, Esq., for the General Counsel
Fred F. Holroyd, Esq. for the Respondent

DECISION

Statement of the Case

George Carson II, Administrative Law Judge: This case was tried in Catlettsburg, Kentucky, on May 6 and 7, 1997.¹ The second consolidated complaint issued on January 7, 1997.² The complaint alleges two threats and one interrogation in violation of Section 8(a)(1) of the National Labor Relation Act,³ and the transfer and wage reduction of one employee, the discharge of three employees, and the layoff of three employees following their participation in an alleged unfair labor practice strike in violation of Section 8(a)(3) of the Act.⁴ Respondent's timely answer denied all violations of the Act.

On the entire record,⁵ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is engaged in construction contracting from its facility in Huntington, West Virginia. It annually performs services valued in excess of \$50,000 for customers located outside the State of West Virginia. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6),

¹ All dates are 1996 unless otherwise indicated.

² The charge in Case 9-CA-34160 was filed on September 3; the charge in Case 9-CA-34227-3 was filed on October 3; the charge in Case 9-CA-34266 was filed on October 7; the charge in Case 9-CA-34323-2 was filed on October 23; the charge in Case 9-CA-34425 was filed on November 29; and the charge in Case 9-CA-34452 was filed on December 12, and thereafter amended on December 27.

³ I granted Respondent's motion to dismiss two Section 8(a)(1) allegations upon which no evidence was offered.

⁴ The complaint also alleges that two of the three employees who were unlawfully laid off are currently engaged in an unfair labor practice strike.

⁵ General Counsel's Exhibit 10, additional payrolls, was provided after the close of the hearing. Without objection, it is received.

and (7) of the Act.

The answer admits, and I find and conclude, that Tri-State Building and Construction Trades Council, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Respondent, Jo-Del, Inc., is a nonunion contractor. For the past 20 years it has been operated by Jeffrey Riedel, who became president of Respondent a month prior to the hearing. Previously Riedel had been vice president. In the summer of 1996, Jo-Del was involved in several different projects, including construction of an osteopathic center at Lewisburg, West Virginia, construction at Greenbrier Community College, also in Lewisburg, and construction of a cold drawn steel plant near Point Pleasant, West Virginia. Although a nonunion contractor, Jo-Del did employ individuals who were union members.

In the summer of 1996, the Tri-State Building and Construction Trades Council began organizational activity among Respondent's employees.

Respondent opposed the Union's organizational activity. On September 6, Riedel directed all Jo-Del employees to report to a Ramada Inn in Charleston, West Virginia, where he addressed them, stating Respondent's opposition to unionization. The parties stipulated to the text of the speech in which Riedel noted that "seniority plays the biggest part in . . . when and where you work." He then stated:

We have experienced instances where up to 50 so-called unemployed union personnel have shown up at one of our jobsites seeking employment. Other times, we have had up to 15 individuals visit our office seeking employment. Add to those numbers the 70 who work for Jo-Del[,] and some of you may have to wait for at least 134 job positions to become vacant before you can work. Top that number off with all the employees of the other merit shop contractors they're attempting to organize[,] and some of you may never work.

Near the close of his speech, he addressed the employees with the following remarks:

If there are currently some employees of Jo-Del who are dissatisfied with the working conditions here or with their relationship with the company, you have no contract here and I'm willing to sever any ties that there may be and part on good terms. If you're that dead set on being union, don't try to force your opinions on others, because there are quite a few here who don't understand why you want to try to force upon them something they don't want.

B. Facts

1. Lewisburg Jobsite

5 Timothy Adkins, a journeyman carpenter with over 15 years experience, began working for Respondent in January 1995. In June 1996, he was assigned to Respondent's osteopathic center jobsite in Lewisburg. His job assignment was installation of dry wall, a task performed with a partner due to the weight of the 4 x 10 pieces of sheetrock. Adkins worked with Herbert Blankenship. The superintendent on the site was John Walkup. James Boyd, project manager, normally visited the site once each week, usually on Monday.

15 Union business agent Thomas Williams had, in May, spoken with Adkins, who was not a member of the Union at that time. Adkins agreed to engage in organizational activity on behalf of the Union. In mid-July, Adkins began solicitation of his fellow employees on behalf of the Union. He did this both before and after work, as well as at lunch. Walkup, who is a union member, cautioned Adkins about soliciting in the building, stating that "Mr. Riedel wouldn't like it, and he [Walkup] would be put on the spot. . . ."⁶ At the same time he began soliciting, Adkins began wearing a cap inscribed with the name of Local 302 of the Carpenters Union. The cap was white with a green bill.

20 On July 23, Blankenship went to get a drink of water after he and Adkins had lifted a sheet of dry wall into place. Adkins remained and attached the sheet of dry wall to the metal studs, a task that took approximately five minutes. When he completed that task, Adkins began making his way to the rest room. On his way he encountered Blankenship, who was returning from getting water. As they approached one another, a new employee, Eugene Cochran, appeared and asked about quitting time. At this same time, project manager Boyd encountered the threesome. Boyd asked what they were doing, and Adkins indicated that they were hanging sheet rock. Boyd asked where, and Adkins told him.

30 Boyd reported to Riedel that he had seen Adkins walking around and talking with other employees on two occasions. He did not describe the circumstances of either of these observations. Boyd stated that he wanted to transfer Adkins to a job where there were fewer employees so that he could be more closely supervised. Riedel told Adkins that it was his decision. Boyd did not criticize either the quality or quantity of the work Adkins had performed, only that he had seen him walking around and talking with other employees on two occasions. Although Boyd did not mention the Carpenters Union cap that Adkins was wearing, I find that he observed it when he spoke with Adkins on July 23.

40 On July 24, about half way through the work day, Walkup told Adkins to call Boyd at the main office. Adkins did so. Boyd told him that "we can't afford to have you loafing." Adkins asked what he was talking about and Boyd, referring to his encountering the three employees, stated that "you all" had been standing in the hallway talking. Adkins sought to explain what had happened, but Boyd ignored him. He told Adkins that he was being moved to the Greenbrier College jobsite. Adkins then asked to speak to Riedel. Adkins asked what was going on. Riedel told Adkins he was being transferred. Adkins asked what this was about, and Riedel said that he had been talked to before about loafing. Adkins denied this and asked, "What's this?" Riedel replied that Boyd saw him. Adkins said he did not know what to tell him. Riedel ended the conversation saying that he had to put some faith in his project manager.

⁶ This comment was not alleged as a violation of Section 8(a)(1) in the complaint. Since Walkup did not testify, it was not fully litigated.

Blankenship was not transferred. Immediately prior to Adkins' transfer, there were six employees and one supervisor on the Greenbrier Community College job. After being transferred, Adkins initially worked, and was paid, as a laborer. Since he was not performing skilled carpentry work, his wage was cut from \$25.37 per hour to \$19.12 per hour.⁷ This continued for several months until the Greenbrier job progressed to the point that Adkins' carpentry skills were again utilized.

2. Point Pleasant Jobsite

In August, Respondent began hiring personnel to construct a cold drawn steel plant near Point Pleasant, West Virginia. The Union learned that this work was available and authorized members to seek work at this jobsite. Various members did so. Superintendent Guy Kerfoot hired union members Sam Saunders, a journeyman carpenter, and Jeffrey Camp, a laborer. Rick Long had previously been a member of the Carpenters Union, but was not a member at the time he was hired. Andrew Raike carried a Steelworkers card, but was not a member of a local affiliated with the Tri-State Building And Construction Trades Council. David Hall and Jake Stephenson had no connection with any union.

At some point after he was hired, Long was contacted regarding the Union's organizational effort. He stated his willingness to again become a member and was sent a supply of union authorization cards. On September 13, at an Exxon service station located about a quarter of a mile from the jobsite and at which the employees regularly stopped on their way to work, Long handed out the union authorization cards to his fellow employees as they stopped by the station. Job superintendent Kerfoot also regularly stopped at the station, and he did so on September 13. On that morning at the Exxon service station, Kerfoot saw the employees talking with various individuals whom he did not know. Although Hall testified that he was filling out a union card some twenty feet from where Kerfoot stopped his vehicle, there is no evidence that Kerfoot either observed Hall or knew what he was doing.⁸ Hall left before Kerfoot.

In mid-September, Kerfoot asked Camp if he were in the Union. Camp responded affirmatively. In mid-September Kerfoot also spoke with Saunders regarding his union membership. In the course of the conversation he reconfirmed that Camp was a union member, stating that "Pete works out of the Laborers Hall," a statement with which Saunders agreed. Kerfoot then specifically inquired about the union membership of employee David Hall, who regularly rode to work with Camp. He asked, "How about David?" Saunders replied that Hall did not work out of any union hall.⁹

Respondent was, at this jobsite, constructing a large "T" shaped building. On September 30, Camp was carrying materials to the carpenters who were building boxes for the steel

⁷ Although Adkins' pay was cut, payroll records reflect that four of the employees on the Greenbrier jobsite were receiving carpenters' wages.

⁸ Even if I were to infer that Kerfoot observed Hall, there is no basis for inferring that he knew what he was doing. *Rayse-IDE, Inc.*, 284 NLRB 879 (1987).

⁹ General Counsel suggests that since Hall and Camp rode to work together, "it was natural for Kerfoot to assume that Hall would join the ranks." In the absence of any evidence that Hall spoke to other employees about the Union or engaged in any activity other than signing the card, I find no basis for making such an assumption. Kerfoot's source of information about employees, Saunders, did not identify Hall as a union supporter.

uprights. He was also assisting by threading taps onto the end of rods that the carpenters were pushing through to him. Kerfoot left the jobsite three times in order to prepare a diesel fuel tank. On one of the occasions that he returned to the jobsite, he noticed that Camp appeared to be throwing something, he did not know what. Employee Donnie Robinson reported to Kerfoot that he had observed Camp and another employee, Tom Brooks, making mud balls and throwing them.¹⁰ On a previous occasion Brooks had thrown mud at Robinson and Kerfoot had laughed about it. Camp acknowledged throwing dirt out of the way so that he could thread the taps onto to ends of the rods. He denied throwing mud at anyone.

On September 30, Saunders was setting plates at the extreme left end of the top of the "T" shaped building. Hall was cleaning footers on the outside of the wall on the stem of the "T."

Kerfoot testified that, in addition to observing Camp appear to throw something, on each occasion when he returned to the jobsite, he observed that Camp, as well as Saunders and Hall, were not where they were supposed to be; rather, they were mingling with other employees away from their work areas. He further testified that the work that these employees were supposed to be performing was not being done; the job was not progressing properly. Because of this, he decided to terminate their employment. Neither Camp nor Hall were called to deny leaving their work area and wasting time, the conduct which Kerfoot testified was the reason for their terminations.¹¹

Saunders denied being out of his area and not performing the work he was assigned to perform. Saunders is extremely skilled, with over twenty years experience. In addition to regular carpentry work, he performed lay out work with Kerfoot. He credibly denied neglecting his work and specifically stated that he had completed all that he was supposed to have completed on September 30.¹² I do not credit Kerfoot's testimony that he observed Saunders out of his work area or that Saunders had not performed all of his assigned work on September 30.¹³

¹⁰ Respondent's brief incorrectly states that Robinson reported that "[t]he three men [Saunders, Hall, and Camp] were seen throwing mud." Although Robinson reported both Camp and Brooks, Kerfoot mentioned only Camp, not Brooks, when testifying about the report he received from Robinson.

¹¹ Several witnesses, in response to General Counsel's questions, testified generally that they had not observed Saunders, Camp, or Hall loafing, goofing off or not working when they were supposed to be working. Camp, as noted above, was asked about, and denied, throwing mud at anyone. Hall also was asked about, and denied, throwing mud. Neither were asked about leaving their work area and wasting time on the day that Kerfoot left the jobsite several times. Unlike Saunders, who was recalled, neither Camp nor Hall were recalled to deny the conduct that Kerfoot testified he observed.

¹² Robinson testified that, on the same day as the day he reported to Kerfoot that Camp and Brooks had been throwing mud, he reported to Kerfoot that Saunders and Hall had not been working, although he says he did not need to make such a report because "wasn't nothing getting done." Robinson did not recall the actual date. Robinson stated that Saunders and Hall were working together at the bottom of the stem of the "T." On September 30, Saunders and Hall were working separately, at places other than the bottom of the "T." Kerfoot did not testify to receiving a report regarding Saunders and Hall from Robinson. I do not credit Robinson's uncorroborated testimony regarding Saunders and Hall.

¹³ "It is . . . common . . . for a trier of fact to believe some, but not all, of a witness's testimony." *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Counsel for General Counsel argues that all of Kerfoot's testimony is suspect; however, regarding the neglect of job duties on September 30, she adduced evidence specifically rebutting only Kerfoot's testimony relating to

Continued

On October 1, when Saunders and Hall reported to work, Kerfoot told them that he did not need them anymore. Camp was absent on October 1. When he reported to work on October 2, Kerfoot told him that he was no longer needed.

A new laborer, Mike Nutter, was hired and began work on October 2.

Union business agent Williams learned of the terminations of Saunders, Camp, and Hall. On October 16, Williams picketed the Point Pleasant jobsite together with the business agent of the cement finishers' local union, and a representative from the laborers' and carpenters' local unions. The signs they wore reported that Jo-Del had been charged with unfair labor practices.¹⁴

On October 15, 16, and 17, the employees were pouring concrete into forms that had been prepared for the floor of the structure. Employees Rick Long, Andrew Raike, and Jake Stephenson regularly rode to work together. They worked on October 15. On October 16, the date that the Union picketed the jobsite, Stephenson was driving. He stopped when he observed the pickets. Long, Raike, and Stephenson spoke with the pickets. They then returned to the vehicle and went home. Despite the absence of these employees, the pouring of the concrete was carried out on October 16.¹⁵

On October 17, there was no picket line. Long, Raike, and Stephenson reported to work as usual. Kerfoot was late. When he arrived at the jobsite, the employees were already working. He called Long, Raike, and Stephenson together. When they had assembled, he told them that he was laying them off because they had left him in a bind the day before. Kerfoot testified that he made the decision to lay off these employees since they were not really needed, as evidenced by the successful pouring of the concrete without them on October 16. I do not credit this testimony. It conflicts with Kerfoot's contemporaneous statement that the employees had left him in a bind. It is also inconsistent with Respondent's payroll records which reflect that, on October 17, Kerfoot worked 15 hours, as did several of the remaining employees, including a new employee, Steve Taylor, who was hired and also worked 15 hours that that same day.

Only a total of 29 hours of work was performed by laborers for the payroll period ending October 30, and only a total of 40 hours was performed for the payroll period ending November 6. The payroll period ending November 20 reflects 55 total hours of work.¹⁶ On Friday, November 22, Kerfoot called Long, Raike, and Stephenson and requested that they report to work on Monday, November 25. They did so, and all worked on November 25 and 26. On Tuesday, November 26, Kerfoot told Long, Raike, and Stephenson that the job was going to be shut down for the Thanksgiving holiday and the weekend. There would be no work on Wednesday or Friday.

Saunders. As discussed above, I have credited that testimony.

¹⁴ The charge in Case 9-CA-34266, alleging the three discharges, was filed on October 7.

¹⁵ The picketing did not induce any individual to cease doing business with Respondent. Respondent's employees who honored the picket line protesting Respondent's unfair labor practice, the terminations of October 1 and 2, of which I have found the termination of Saunders to have been unlawful, were engaged in a lawful strike pursuant to Section 13 of the Act.

¹⁶ The payroll period ending November 13 was not placed into evidence. Kerfoot, although the job superintendent, appears on the payrolls as a carpenter. His hours are not reflected in the totals stated above.

On Monday, December 2, Long, Raike, and Stephenson reported to work. Long noticed that a large number of forms that had not been constructed when the employees left the jobsite on the previous Tuesday had been constructed and were in place. He confronted Kerfoot about this, asking what he had against union carpenters.¹⁷ After further conversation Long stated that he was going to make a telephone call. Long and Raike left, called the Union, returned, and told Kerfoot that they were on strike.

C. Analysis and Concluding Findings

1. The Section 8(a)(1) Allegations

In his September 6 speech, Riedel pointed out to Respondent's employees what he considered to be various disadvantages in working through referral from a union hall. He states his opinion that "seniority plays the biggest part in . . . when and where you work."¹⁸ He noted that some 65 union member had applied for work at Jo-Del, which had 70 employees, and that if they had been being referred, some employees would have to wait for 134 vacancies. He then stated "[t]op that number off with all the employees of the other merit shop contractors they're [the Union] attempting to organize[,] and some of you may never work." General Counsel argues that this statement violated Section 8(a)(1) of the Act, but cites no persuasive case authority. Section 8(c) of the Act, cited by Respondent, protects the expression of "any. . . opinion. . . if such expression contains no threat of reprisal or force or promise of benefit." I find, as in *Pentre Electric*, 305 NLRB 882, 883 (1991), that Riedel's statement reflected his opinion of the consequences of referral of employees from a hiring hall. It threatens no retaliatory action by Respondent. In these circumstances, I find that Riedel's comment did not violate the Act.

Riedel, near the end of his speech, advised employees "who are dissatisfied with the working conditions here" that they had no contract and that he was "willing to sever any ties that there may be." Any doubt that the reference to those "who are dissatisfied" referred to those who supported the Union was immediately removed when Riedel stated, in the very next sentence, that "[i]f you're that dead set on being union, don't try to force your opinion on others." Riedel's stated willingness to "sever any ties that there may be," although constituting an intriguing turn of phrase, does not alter the clear message: Employees who supported the Union should quit. By advising that those who supported the Union should quit, Respondent violated Section 8(a)(1) of the Act. *Tualatin Electric*, 312 NLRB 129, 134 (1993).

Kerfoot admitted the conversation in which he sought to obtain as much information as he could regarding the union sympathies of employees that Saunders knew. Saunders himself was a union member, and I find no element of coercion regarding Kerfoot's questioning Saunders about the Union. Kerfoot was not privileged to probe for information regarding others. *Action Auto Stores*, 298 NLRB 875, 895 (1990). In confirming that Camp was a union member and in seeking to discover whether Hall was a union member, Kerfoot violated Section 8(a)(1) of the Act.

2. The Section 8(a)(3) Allegations

¹⁷ Payroll records confirm that work was performed by at least seven employees on Wednesday and Friday, November 27 and 29.

¹⁸ The Union's hiring hall rules were not placed into evidence. There is no claim that this statement was incorrect.

a. The Lewisburg Jobsite

Adkins engaged in union activity and Respondent was aware of that activity. Indeed, Superintendent Walkup had cautioned Adkins about soliciting in the building, noting that Riedel would not like it. In late July, Adkins had begun wearing a distinctive Carpenters Union cap. He was he was involuntarily transferred, and his wages were cut, after Boyd saw him speaking with a fellow employee. In view of Respondent's animus towards employee organizational activity, as found above, I find that General Counsel has established a prima facie case.¹⁹

Respondent presented no probative evidence that Adkins neglected his job duties. Indeed, the only evidence presented was the hearsay report that Riedel received from Boyd.²⁰ That report did not establish any job deficiency, only that Boyd claimed that he twice observed Adkins walking around and talking to other employees. The record establishes, and I find, that Boyd observed a group of three employees in a brief conversation. One of the participants, Adkins, was wearing a cap bearing the inscription of Local 302 of the Carpenters Union. If there had been any job deficiency on Adkins' part, his partner Blankenship would have been equally responsible for such deficiency. No job deficiency was cited. Indeed, after Adkins was transferred, superintendent Walkup told Blankenship that he wanted Adkins back on the job.

Respondent has not established that Adkins would have been transferred if he had not been engaged in union organizational activity. There is no evidence that Adkins needed closer supervision. I find that the reference to a need for closer supervision reflects Respondent's concern with Adkins' union organizational activities. Respondent did not present superintendent Walkup, who observed Adkins' work on a daily, rather than an intermittent, basis. There was no reference to a need for closer supervision of Blankenship who was not engaged in union activity and who was not wearing a union cap. The need for closer supervision referred not to Adkins' job performance, but to Respondent's desire to restrict his organizational activities. Respondent removed Adkins, who was actively engaging in organizational activity, from the busy osteopathic center jobsite to the Greenbrier site where there were only six other employees. I find that this transfer was directly motivated by Adkins' union activity, and Respondent's animus towards that activity. By transferring Adkins, Respondent violated Section 8(a)(3) of the Act.

b. The Point Pleasant Jobsite

Sam Saunders was a known union member. When Kerfoot interrogated Saunders, he confirmed that Camp was a union member. I find no probative evidence that Respondent was aware of any union affiliation or activity by Hall. The only activity to which Hall testified was the signing of an authorization card on September 13. There is no probative evidence that Respondent was aware of this. Hall did not testify to engaging in any other union activity, such as engaging in conversations relating to the Union with other employees. Thus, as to Hall, a "fundamental prerequisite" for establishing a discriminatory motive has not been established. *Bayliner Marine Corporation*, 215 NLRB 12 (1974). The absence of evidence establishing knowledge by Respondent of any union activity or affiliation by Hall precludes the finding of a violation of Section 8(a)(3) of the Act.²¹

¹⁹ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981).

²⁰ I draw no adverse inference from Respondent's failure to call Boyd since he is no longer employed. *Lancaster-Fairfield Community Hospital*, 303 NLRB 238, fn. 1 (1991).

²¹ I also note that Hall was not called to rebut the testimony that he had repeatedly been out of his work area on September 30.

The analytical framework of *Wright Line* is applicable in dual or mixed motive cases after General Counsel has established employee union activity, employer knowledge of that activity, animus towards such activity, and adverse action taken against those involved in, or suspected of involvement in, that activity.

Although Camp did deny throwing mud at anyone in his direct testimony, he was not called to rebut the testimony that, on September 30, he had regularly been out of his work area and had not been performing his assigned job tasks. Kerfoot had, on a previous occasion, laughed when he heard that someone had thrown mud at employee Robinson. On cross-examination he testified that he was not too concerned about the mud throwing, that what concerned him was that Camp was not doing his work. I find that Respondent has established that Camp would have been terminated regardless of his union affiliation due to his conduct on September 30. Thus, his termination did not violate Section 8(a)(3) of the Act.

I do not credit Kerfoot's testimony that he summarily terminated Saunders, supposedly for not doing his job. Saunders credibly testified that he was not out of his work area and that he did perform the work assigned to him on September 30. Kerfoot was aware of Saunders' union affiliation. Respondent's animus towards employees who engaged in union activity is established. Saunders, a skilled journeyman carpenter with 20 years experience, had been performing lay out work with Kerfoot. In view of his superior skills and knowledge of other employees, of which Kerfoot was aware following the interrogation regarding the union affiliation of Camp and Hall, I find that Kerfoot considered Saunders to be a leader among the employees. Respondent did not wish to have a skilled journeyman providing leadership during the Union's organizational effort. Kerfoot sought to camouflage his unlawful action by terminating Saunders at the time he legitimately terminated Camp and Hall. The hiring of a new employee, Mike Nutter, on October 2, establishes that the services of at least one of the three terminated employees was needed. I find that the reasons asserted by Kerfoot for terminating Saunders were pretextual since Saunders had not been out of his work area and had not neglected his job.²² Respondent, by terminating Saunders, violated Section 8(a)(3) of the Act.

Turning to Respondent's treatment of Long, Raike, and Stephenson, there is no question that when they refused to cross the union's picket line, they were engaged in union activity and Respondent was aware of that activity. Kerfoot told them that he was laying them off because they had left him in a bind, thus establishing a clear nexus between their union activity and his action. After taking this retaliatory action, Kerfoot and several of the remaining employees, including new hire Taylor, had to work for 15 hours each. The evidence of discrimination in the instant case is even more compelling than the evidence in *National Fabricators*, 295 NLRB 1095 (1989), where the respondent selected seven employees for a temporary layoff because it believed they were likely to engage in the protected union activity of honoring a picket line that might be set up in the near future. In finding a violation the Board stated that "we think it clear beyond peradventure that the criterion used by the Respondent to select employees for layoff—disfavoring employees who were likely to engage in protected union activities—is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity." *Ibid.* In the instant case the employees selected had actually engaged in protected union activity by honoring a picket line. I do not credit Kerfoot's testimony that he determined that he did not need these employees. He told Raike, Stephenson and Long that they had left him in a bind. He retaliated against them by laying them off. I find that the "direct and proximate cause" of the selection of Long, Raike, and Stephenson for layoff was their honoring of the union's picket line. *Bingham Willamette*, 282 NLRB 1192, 1194 (1987). By

²² *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

laying off Long, Raike, and Stephenson, Respondent violated Section 8(a)(3) of the Act.

Respondent's discrimination against Long, Raike, and Stephenson continued in November when Kerfoot recalled them for two days and then told them that there would be no work on Wednesday or over the Thanksgiving holiday weekend. By failing to schedule them for work on November 27 and 29, while untruthfully telling them there would be no work over the Thanksgiving holiday weekend, Respondent violated Section 8(a)(3) of the Act.

Long, Raike, and Stephenson discovered Respondent's untruthfulness when they reported to work on December 2. Long and Raike confronted Kerfoot about this, and both left to contact the Union. Thereafter they returned to the jobsite and advised Kerfoot that they were on strike. Stephenson did not strike; he continued to work. I find that the strike in which Long and Raike engaged was caused by Respondent's unlawful discrimination against them, and it is, therefor, an unfair labor practice strike.²³

Conclusions of Law

1. By advising employees who support the Union that they should quit and interrogating employees regarding the union affiliation and sympathies of other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By transferring Timothy Adkins on July 24, 1996, discharging Sam Saunders on October 1, 1996, and laying off Rick Long, Andrew Raike, and Jake Stephenson from October 17, 1996, until November 25, 1996, and failing and refusing to schedule them for work on November 27 and 29, 1996, because of their union sympathies and activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily transferred Timothy Adkins, it must make him whole for any loss of earnings and other benefits, computed on a quarterly basis, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily discharged Sam Saunders, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, having discriminatorily laid off, and failed and refused to schedule for

²³ Although Kerfoot told Long that, if he left, he would consider him to have quit, Respondent, after Long and Raike advised that they were on strike, has afforded them their rights as strikers. *Matlock Truck Body & Trailer Corp.*, 217 NLRB 346, 349 (1975). No violation is alleged regarding Kerfoot's initial remarks.

work, Rick Long, Andrew Raike, and Jake Stephenson, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis, less any net interim earnings, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²⁴

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

10 The Respondent, Jo-Del, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

15 (a) Advising employees who support the Tri-State Building And Construction Trades Council, AFL-CIO, or any other union that they should quit.

(b) Interrogating employees concerning the union affiliation and sympathies of other employees.

20 (c) Transferring, discharging, laying off, or otherwise discriminating against any employee for supporting the Union.

25 (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

30 (a) Within 14 days from the date of this Order, offer Sam Saunders full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

35 (b) Make Timothy Adkins, Sam Saunders, Rick Long, Andrew Raike, and Jake Stephenson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

40 (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful transfer, discharge, and layoffs and notify the employees in writing that this has been done and that these actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents

45 ²⁴ I am mindful that, despite the discrimination against these employees, Respondent's payroll records confirm that the remaining employees did not work continuous full work weeks between October 17 and November 24. I shall leave for compliance the computation of the appropriate amount of back pay. I note that there is no allegation of discrimination since December 2, when Stephenson returned to work and Long and Raike went on strike.

²⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Huntington, West Virginia, and at all current jobsites, copies of the attached notice marked "Appendix."²⁶ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 31, 1997

George Carson II
Administrative Law Judge

²⁶ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT advise any of you who support the Tri-State Building And Construction Trades Council, AFL-CIO, or any other union that you should quit.

WE WILL NOT interrogate you concerning the union affiliation and sympathies of your fellow employees.

WE WILL NOT transfer, discharge, lay off, or otherwise discriminate against you for supporting the Union.

WE WILL, within 14 days from the date of the Board's Order, offer Sam Saunders full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Timothy Adkins, Sam Saunders, Rick Long, Andrew Raike, and Jake Stephenson for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

JO-DEL, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street, Room 3003, Cincinnati, Ohio 45202-3271, Telephone 513-684-3663.